

U.S. Department of Labor

Office of Administrative Law Judges  
John W. McCormack Post Office  
and Courthouse  
Room 409  
Boston, Massachusetts 02109

*Lebrary*



USCOL  
ALJ LAW LIBRARY

\*\*\*\*\*

In the Matter of:

William **F. Brock**,  
Secretary of Labor  
U.S. Department of Labor  
Complainant

Case No. 85-JTP-1

v.

The Governor of the  
Commonwealth of Massachusetts  
Respondent

\*\*\*\*\*

Appearances:

Vincent C. Costantino, Esq.  
For the Complainant

Joellen M. D'Esti, Esq.  
For the Respondent

Before: DAVID W. DI NARDI  
Administrative Law Judge

E-ALJ-000337

DECISION AND ORDER

This proceeding arises under the Job Training Partnership Act, Pub. L. 97-300, 29 U.S.C. 61501, et seq., hereinafter referred to as "the Act" or "JTPA", and the Rules and Regulations promulgated thereunder, 20 C.F.R. §626 et seq.

Respondent timely appealed the November 6, 1984 Final Determination of the Deputy Assistant Secretary, U.S. Department of Labor, (Complainant), which ordered the Governor to allocate \$1,013,382.00 to the Service Delivery Areas within the Commonwealth by December 6, 1984, and, if such funds were not allocated by that date, such amount would constitute a debt owed to the Federal Government as an unallowable cost. An expedited hearing was held in Boston, Massachusetts on February 27 and 28, 1985 at which time the parties were given the opportunity to adduce testimony, offer documentary evidence and make oral arguments. The following references will be used: TR for transcript, cx for Complainant's exhibit, RX for Respondent's exhibit, JX for a joint exhibit and ALJ EX for a pre-hearing exhibit submitted into the record by this Administrative Law Judge.

The post-hearing evidence, admitted into evidence as identified, consists of: the Complainant's cover letter, CX 16, forwarding volume one, CX 17, and volume two, CX 18, both volumes comprising the legislative history of the Act;

Complainant's post-hearing brief (CX 20) and cover letter (CX 19), as well as Respondent's brief (RX 17), proposed findings of fact, (RX 18), and Certificate of Service (RX 19); and Respondent's submittal of the Act's legislative history forwarded by cover letter (RX 14), Volume VII (RX 15) and Volume VIII (RX 16). The record closed on April 1, 1985 upon receipt of Complainant's and Respondent's briefs. CX 20, RX 17.

The parties have stipulated, and the record establishes, that Respondent was allotted a total of **\$20,267,639.00** for Title II-B, Summer Youth Employment and Training Programs, of which the Governor allocated **\$19,254,257.00** to the Service Delivery Areas, and retained **\$1,013,382.00** for Title II-B administrative and auditing activities. JX 1. The sole issue presented in this proceeding is whether the Governor can legally retain five percent of the total amount granted the Commonwealth for Title II-B programs under the Act for the purpose of administering, monitoring and auditing Title II-B activities.

#### Summary of the Evidence

The Job Training Partnership Act was approved by the House of Representatives and by the Senate on October 13, 1982, CX 18 at 13, RX 16 at 32, and signed by President Reagan that same day. RX 31. This act was passed as a replacement of the Comprehensive Employment and Training Act which expired in 1982. 128 Cong. Rec. S7821 (daily ed. July 1, 1982) (Statement of Senator Quayle), RX 16 at 25; 128 Cong. Rec. H 5061 (daily ed. August 4, 1982) (statement of Rep. **Chisholm**) RX 16 at 26. The stated purpose of the Act is to "establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment..." 29 U.S.C. 61501. To accomplish this purpose the Act is divided into several titles: Title I establishes the structure and mechanics of the program; Title II provides for training of the disadvantaged; Title III assists dislocated workers; and Title IV establishes programs to be federally administered.

The Summer Youth Employment and Training Program was established by Title II, Part B, and is separate from the adult and youth programs found in Title II-A. "It is a separate title to deal with a separate but very important and fundamental issue." 128 Cong. Rec. S7821 (daily ed. July 1, 1982) (statement of Sen. Quayle). RX 16 at 25. Furthermore, Congress did not intend that the costs for the summer program be subject to the restrictions of the formula breakdown on training costs versus allowances and administrative costs. Id. at RX 18.

The Governor has the authority, duty and responsibility to plan programs and administer funds under the Summer youth Employment and Training Programs (Part **B**) as he has under the Adult and Youth Training Program (Part A). These duties are enumerated at Sections 121 and 122 of the Act. The Governor has demonstrated that he has complied with these requirements having established an elaborate system to implement, monitor and review the Summer Youth Employment and Training Programs. See testimony of David K. Breen, Jack King, David Eisenthal, RX **7**, and RX 6 at 6 through 10 and **13**.

The Funds which are allocated to the Commonwealth for Title II-B activities can be used for "...basic and remedial education, institutional and on the job training, work experience programs, employment **counseling**, occupational training, preparation for work, outreach and enrollment activities, employability assessment, job referral and placement, job search and job club activities, and any other employment or job training activity designed to give employment to eligible individuals or prepare them for, and place them in employment; and... supportive services necessary to enable such individuals to participate in such program." 29 U.S.C. 61632. Supportive services do not include administrative planning or monitoring expenses. See Se'c. **4(24)**

When Congress appropriates funds for Part B programs there is a direct determination of the number of summer youth jobs which Congress wishes to fund and the appropriation is based on the number of jobs created with no consideration taken, or allowance made for, administrative expenses. TR 202. The Governor has a fiduciary responsibility with respect to these funds which are received. He must insure that the quantity of the funds expended are within the constraints of the contract of the grant (**CX 4 at 3**) and that the quality of the expenditure is within the constraints of the law and appropriate procedures. TR 266-267.

On January 10, 1984 the Governor received **\$16,839,184.** and notified the Service Delivery Areas on February 3, 1984 of this grant. On July 3, 1984 the Governor received an additional **\$3,428,455.00** for the Summer youth Employment and Training Programs and informed the Service Delivery Areas by July 13, 1984 thereof. CX 4 at **B**. A Service Delivery Area, as referred to in Section 101 of the Act, is comprised of one or more units of general local government that will effectively provide job training to a labor market area. The Commonwealth has divided itself into fifteen Service Delivery Areas. CX 4 at **B5, B7**.

The total grant for the Commonwealth was **\$20,267,639.00**, of which **\$1,013,382.00** was retained by the Governor for state administration of this program. The Service Delivery Areas were told by the Governor that they might **use an** additional

fifteen percent of their allocations for administration of their programs, even though they were initially instructed that they could only spend ten percent of their funds for administration. CX 4 at **C10**.

The initial audit of the Commonwealth's JTPA Program was completed on September 22, 1983. At that time the Inspector General's Office made no comment on the Commonwealth's policy of retaining five percent of Title II-B funds for administration. CX 4 at **C9**, Page 17. The Department's Acting Regional Administrator, however, issued a memorandum advising the Governor which Funds under the Act could be used for state administration, and specifically noted that one hundred percent of the Title II-B funds must be allocated to the Service Delivery Areas. CX 4 at C8. On March 22, 1984 the Acting Regional Administrator responded to the findings of the Office of Inspector General. In this letter the Department reiterated its position that one hundred percent of Title II-B funds must be allocated to the Service Delivery Areas. CX 4 at **C5**, Page 4. The Deputy Assistant Secretary of Labor on May 24, 1984 contacted the Governor questioning the Commonwealth's withholding of Title II-B funds. CX 4 at C3.

The Department of Labor, after conducting an investigation of the Commonwealth's retention of Title II-B funds, concluded that the Commonwealth wrongfully withheld five percent of its Title II-B allocation and also allowed the Service Delivery Areas to use an additional fifteen percent for their administrative costs. The Department concluded that the Governor had violated 20 **C.F.R. §620.2(b)** and Sections **162(e)** and **251(b)** of the Act and the Governor was given thirty days to respond to the findings of the investigation, CX 4 at **B7**. The Commonwealth responded and submitted Policy Directive **84-075** showing that the Commonwealth had retained five percent of the grant for administration of this program. CX 4 at **B5**. The Governor also responded that the Commonwealth properly retained five percent of the Title II-B funds to carry out his mandated oversight responsibilities. CX 4 at **B4**. Representatives of the Commonwealth and the Department of Labor met in Washington on September 21, 1984. CX 4 at **B1**, **B2**, and **B3**. On November 6, 1984 the Deputy Assistant Secretary issued his Final Determination that the Governor had failed to allocate \$1,013,382.00 of Title IX-B funds to the Commonwealth's Service Delivery Areas, thereby violating Section **251(b)** of the **Act**.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### Allocation of Funds Under Title ~~II-B~~

Section 251 of the Act provides for the appropriation of funds for Title II-B programs. Provision **(b)** of this section breaks down the nationwide appropriation to the States under the formula contained in Section **201(b)**. After the States

receive their allotments, the States are directed to allocate these funds among their Service Delivery Areas in accordance with Section 202(a)(2) and (3). It is most significant that this section does not include the other provisions of Section 202 which contains the breakdown of training costs and administrative costs. This exclusion and the statements of Senator **Quayle** that this formula was not to be used to determine administrative costs, 128 Cong. Rec. S7821 (daily ed. July 1, 1982) Rx 16 at 25, lead ineluctably to the conclusion that all of the funds appropriated by Congress pursuant to this title must be allocated directly to the Service Delivery Areas.

The Commonwealth argues that the Senate Bill provides that five percent of the amount appropriated for Titles 1-3 and the Job Corps shall be allotted among the States and shall be available to the Governor to cover the costs of auditing and administering the statewide program. TR 238. I cannot accept this thesis. At the time of that statement the Summer Youth Employment and Training Program (Title II-B) was contained in Title VII. Only the current Title II-A was contained in Titles 1-3 when that statement was made. Cx 15, cx 19.

Disallowance of the Commonwealth's retention of five percent of the funds is further supported by the method Congress uses **when** determining appropriations for the Summer Youth Employment and Training Programs. See TR 202. The dollar amount of the appropriation is equal **to a specific** number of jobs which Congress wishes to fund.

I do not accept the Governor's argument that **to** determine the source of funds for the Service Delivery **Areas'** allocation he must look to Section 202(a) (1); and since that provision is only seventy-eight percent of the total, only seventy-eight percent of the Commonwealth's allotment must be allocated to the Service Delivery Areas; allowing the Commonwealth to retain five percent for administration, and the remaining seventeen percent not allocated can be passed through to the Service Delivery Areas. Clearly Congress intended all of the Commonwealth's allotment under Title II-B to be allocated to the Service Delivery Areas and the Governor was obligated to allocate one hundred percent of those funds in accordance with Sections 202(a)(2) and (3) as specifically directed by the Act, and such an allocation under Sections 202(a)(2)(A), **(B)** and (C) will equal one-hundred percent. However, I find and conclude that there is no need to refer to Section **202(a)(1)** since Section **251(b)** clearly directs that these funds shall be allocated to the Service Delivery Areas in accordance only with Section 202(a)(2) and **(3)**.

### Section 254 of the Act

Furthermore Section 254 of the Act does not authorize the Governor to set aside five percent of Title II-B funds for administrative costs. Section 254 does not address the use of funds or the allotment of funds. The allotment and allocation of funds by the Governor is found in Section 251 and the use of funds is contained in Section 252. It is, therefore, apparent that Section 254 only assigns duties and responsibilities to the Governor, and provides him with the authority to ensure he can carry out the duties imposed upon him by the Act. This Section, however, does not provide funds for him to use to carry out any of his duties under the Act. TR 230. Accordingly, I find and conclude that Section 254 does not provide a source of funds, **or** make funds available to the Commonwealth. TR 218, 221.

It must be noted that Section 254 requires the same obligations of the Commonwealth under Title II-A and Title II-B, and imposes no new duties upon the Commonwealth that are not already contained in Title II-A. The Service Delivery Areas system and the state role are precisely the same. The duties of the Commonwealth in its administrative oversight of its Service Delivery Areas under both parts of Title II are the same. There is nothing in the Act which creates additional functions by virtue of Title II-B because the Commonwealth's activities are generally not program specific. See TR 66, 67, and 94-96.

This provision of the statute does not provide any independent authority for the use of such funds under Title II-B. Although the Governor may have similar authority, duties and functions under Title II-A as under Title II-B, such added responsibility in no way mandates the authorization of separate funding of administrative and auditing activities under Title II-B. As noted at the hearing the five percent of Title II-A authorized by Section **202(b)(4)** provides ample funding authority for payment of all costs reasonably incurred by the Commonwealth for activities under all titles of the Act. Also the Administrator of the Job Training Program stated that he was not aware of any state which was not meeting its obligations under the Act due to a lack of funds for administration. TR 211,212.

### The Single Audit Act and Fiscal Accounting Principles.

The Commonwealth asserts that OMB Circulars A-87 and A-102, and the Single Audit Act require that Title II-B funds be **used** by the Commonwealth for its administrative and auditing activities under the Summer **Youth** Employment and Training Programs. Rx 6 at **6,7**, and 8. The cost principles under these circulars require an expense to be reasonable and

allocable and if a cost is to be charged against an account the grant against which it is to be charged must benefit from that activity. TR 296. There must be a full and fair allocation of the cost of each particular program to the funding source which bears it. TR 321. In the area of governmental or non-profit accounting where revenues may go their separate way, the cost of a program must be matched against the benefit which is derived from that cost. TR 317. Thus, the Governor argues that the costs of auditing, planning, and monitoring of the Title II-B programs must be matched against the grant which benefits from that cost, i.e., the allotment of Title II-B funds. If the costs of the Title II-B programs were to be assessed against the Title II-A programs, the Commonwealth asserts that this would violate the cost principles under the Single Audit Act, and OMB Circulars A-07 and A-102. Also, according to the Commonwealth, the charge-off would force the Title II-A programs to bear a disproportionate amount of costs to its administration. Furthermore, the Commonwealth posits, it would not be fair to assess II-B costs against II-A programs, and if such an assessment were made, the Title II-B costs would be disallowed in an audit of that program.

However, on the basis of the totality of this record, I find and conclude that these arguments are without merit. First it must be recognized that these auditing regulations and cost principles do not authorize the expenditure of funds. These are guidelines relating to the proper method to use when auditing a program and if the grant **or** the JTPA Act do not allow that method of cost and benefit matching, then the Act, the grant and grant officer's interpretation control the issue and the cost can not be so allocated. Moreover, neither the Act nor the implementing Regulations provide that the Inspector General's opinion is controlling on the Secretary of Labor. The Regulations do, however, state that the Secretary of Labor shall seek to resolve the audit and if he is in agreement with the "Governor's disposition" of the audit, such action will constitute Final Action of the agency. 20 C.F.R. **§629.42(f)**. See also TR 186-87, 143, 213-14. Also, the adoption by the Commonwealth of these cost principles, A-07 and A-102, was voluntary on its part, not required by the Act or its implementing regulations. 48 Fed. Reg. 11076, et seq, March **15, 1983**) (codified at 20 **C.F.R. §629.1(c)**). **RX 13. Any** adverse consequences emanating from that election must be borne by the Commonwealth. Other states have not elected to use these OMB circulars and they have had no problems with their cost allocations under the Act.

I am not convinced that these cost principles would have been violated by the Commonwealth if these costs were charged to an administrative cost pool or against the five percent of Title II-A. The term "Program" could encompass the entire JTPA. Thus, under the Single Audit Act, a charge-off of Title II-B administrative costs to an administrative cost pool

would not violate the Act since the separate Titles are all components of the same program. Even the Commonwealth's expert witness admitted that the Department of Labor's position was plausible, that Title II-B costs could be paid with Title II-A administrative funds. **Tr 327.** Basically the cost principles are a paperwork shift of funds, **TR 324**, and two and a half percent of Title II-A funds could be used to administer Title II-B programs. **TR 329.**

Therefore, having reviewed and considered the voluminous record in this proceeding which was thoroughly and professionally presented by both attorneys, I find and conclude **(1)** that the Commonwealth has failed to allocate five percent of the Title II-B funds to its Service Delivery Areas and **(2)** such funds were wrongfully expended by the Commonwealth for its administrative and auditing activities.

I further find and conclude that the Commonwealth, after a number of requests by appropriate personnel of the Department of Labor, refused to allocate those funds to the Service Delivery Areas, and such retention of funds was in willful disregard of the requirements of the Act. **Tr 183-85, CX 4 at C8, C5.**

The Commonwealth was given written notice, on or about November 10, 1983, prior to the allotment of Title II-B funds to the Commonwealth, that the Department of Labor would not allow the Commonwealth to retain five percent of the Title II-B funds for administrative costs. **CX 4 at C8.** The Commonwealth still maintained its position taken prior to November 10, 1983, a position it has maintained throughout. The Commonwealth by taking such actions has deprived its Service Delivery Areas and their respective populations of the money in dispute and has substantially decreased the job training opportunities for eligible participants in the Commonwealth, especially in these times of fiscal restraint. The Act is plain on its face that Title II-B funds must be entirely allocated to Service Delivery Areas and the Legislative history is plain and unambiguous. Therefore, I find and conclude that the Commonwealth is in violation of **Section 164(e)(1)** of the Act due to its willful disregard of the requirements of the Act, and must repay such amount, **\$1,013,382.00**, with interest at the rate of nine percent, from funds other than funds received under this Act.


#### ORDER

It is therefore ORDERED that the Final Determination of the Deputy Assistant Secretary of Labor is hereby AFFIRMED and



the Commonwealth of Massachusetts shall pay the U.S. Department of Labor **\$1,013,382.00**, plus interest at the rate of nine percent per annum commencing on December 6, 1984, from funds other than funds received under the Job Training Partnership Act for having willfully disregarded the requirements of of the Act. See also Section **164(e)(1)**.

The Decision and Order of this Administrative Law Judge shall constitute final action by the Secretary unless, within 20 days after receipt of this Decision and Order, a party dissatisfied with the Decision or any part thereof has filed exceptions with the Secretary specifically identifying the procedure, fact, law, or policy to which exception is taken. Any exception not specifically urged shall be deemed to have been waived. Thereafter the Decision of this Administrative Law Judge shall become the final Decision and Order of the Secretary unless the Secretary, within 30 days of such filing, has notified the parties that this case has been accepted for review. Section 166(b) of the Act.

  
\_\_\_\_\_  
DAVID W. DI NARDI  
Administrative Law Judge

Dated: **APR 19 1985**  
Boston, Massachusetts

DWD:las

SERVICE SHEET

Case Name: Commonwealth of Massachusetts

Case No. 85-JTP-1

Title of Document: DECISION AND ORDER

This is to certify that a copy of the above-listed  
DECISION AND ORDER was mailed to the following interested  
parties on APR 19 1985.

Patrick J. O'Keefe  
Deputy Assistant Secretary of Labor  
Employment & Training Admin  
Rm. S-2307  
200 Constitution Ave., NW  
Washington, DC 20210

William H. DuRoss, III  
Associate Solicitor for  
Employment & Training  
U.S. Department of Labor  
Room N-2102  
200 Constitution Ave., NW  
Washington, DC 20210

Vincent C. Constantino, Esq.  
U.S. Department of Labor  
Room N-2101  
200 Constitution Ave., NW  
Washington, DC 20210

The Honorable Michael S. Dukakis  
Governor of the Commonwealth of Massachusetts  
State House  
Boston, MA 02100

Evelyn M. Murphy, Secretary  
Executive Office of Economic Affairs  
One Ashburton Place  
Room 2101  
Boston, MA 02108

INTEROFFICE MAIL

Docket

Library

  
LEWIS A. SACKS  
Legal Technician